

BRB No. 98-1533 BLA

JOHN HENRY GUNTRUM, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CARPENTERTOWN COAL	)	DATE ISSUED: <u>8/16/99</u>
AND COKE COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James H. Owen (Calarie and Owen), Kittanning, Pennsylvania, for claimant.

William J. Walls (Marshall, Dennehey, Warner, Coleman & Goggin), Pittsburgh, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-1891) of Administrative Law Judge Michael P. Lesniak awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge found, and the parties stipulated to, twenty-one years of coal mine employment. Decision and Order at 2; Hearing Transcript at 11. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge concluded that the evidence of record is sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b) and that claimant is totally disabled due to pneumoconiosis

pursuant to 20 C.F.R. §718.204(c), (b). Decision and Order at 7-10. Accordingly, benefits were awarded beginning November 1, 1996, the month in which the claim was filed. On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4) and that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b). Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs has filed a letter indicating that he will not respond to this appeal.<sup>1</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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<sup>1</sup>The administrative law judge's determination that benefits commence on November 1, 1996, as well as his findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3), 718.203 and 718.204(c) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-616 (1983).

On appeal, employer initially argues that the administrative law judge erred in finding the presence of pneumoconiosis established pursuant to Section 718.202(a)(4) on the basis of the report rendered by Dr. Paul, as the report of this physician is unreliable. In finding the existence of pneumoconiosis established at Section 718.202(a)(4), the administrative law judge considered the three relevant medical opinions of record and found the opinions of Drs. Paul and Fenster sufficient to support a finding of pneumoconiosis.<sup>2</sup> Decision and Order at 8; Director's Exhibits 8, 22, 23; Claimant's Exhibit 1. Employer argues that inasmuch as Dr. Paul relied upon an x-ray he interpreted as 1/1 and the physician has no special qualifications in interpreting x-rays, Dr. Paul's interpretation must give way to the interpretation of Dr. Mieckowski, a B-reader. Employer's Brief at 2. Employer's contention is misplaced since Dr. Mieckowski re-read the July 22, 1997 x-ray as 1/0 which supports the opinion of Dr. Paul as the interpretation is a positive finding for the existence of pneumoconiosis. *See* 20 C.F.R. §718.102; *Trent, supra*. We, therefore reject employer's contention with respect to the opinion of Dr. Paul. The administrative law judge is empowered to weigh the medical opinion evidence of record and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). As employer makes no other specific challenge to the administrative law judge's findings on the merits, we affirm the administrative law judge's finding that the preponderance of the medical opinion evidence establishes the presence of pneumoconiosis pursuant to Section 718.202(a)(4).<sup>3</sup> *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*,

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<sup>2</sup>Dr. Paul concluded that claimant suffers from coal workers' pneumoconiosis, 1/1 type in six lung zones but more prominent in the mid and lower zones. Claimant's Exhibit 1. Dr. Fenster opined that claimant has severe chronic obstructive pulmonary disease due to smoking and exposure to coal dust. Director's Exhibits 8, 23. Dr. Fino opined that claimant does not have an occupationally acquired pulmonary condition and that his COPD is due to smoking. Director's Exhibit 22. Dr. Cross did not offer an opinion as to whether claimant suffers from pneumoconiosis. Director's Exhibit 23.

<sup>3</sup>The Board is restricted to the specific issues raised on appeal. *See* 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. As employer does not contest the administrative law judge's failure to weigh the evidence pursuant to 20 C.F.R. §718.202(a) in accordance with *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), a case decided prior to the administrative law judge's Decision and Order, we affirm the administrative law judge's finding that the existence of pneumoconiosis is established. *See Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-

6 BLR 1-107 (1983).

Employer further asserts that the administrative law judge erred in finding that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b) in that he accorded greater weight to the opinion of Dr. Fenster as he was a Department of Labor examining physician. Employer's Brief at 3-4. Employer's contention is without merit. Although Dr. Fenster examined claimant on behalf of the Department of Labor, the decision of the administrative law judge, in the instant case does not reflect that the administrative law judge accorded any weight to the physician's opinion on this basis. Decision and Order at 9-10; Director's Exhibit 8; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

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107 (1983); *Sarf, supra*; *Skrack, supra*.

Next, employer argues that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), in finding that the evidence establishes that claimant's total disability was due to pneumoconiosis in that he failed to specifically set forth the reasons for finding Dr. Fenster's opinion better reasoned and documented. Employer's Brief at 3-5. We agree. In finding that claimant is totally disabled due to pneumoconiosis, the administrative law judge set forth the relevant evidence of record and stated that Dr. Fenster's opinion was well reasoned and documented and entitled to greater weight as he adequately explained how claimant's smoking history as well as his exposure to coal dust contributed to his condition.<sup>4</sup> Decision and Order at 10. The administrative law judge failed, however, to explain how the record supports his finding that this opinion is better reasoned and documented than the other medical opinions of record, particularly in light of Dr. Fino's discussion of the objective evidence.<sup>5</sup> Under the APA, the administrative law judge is required to address all relevant evidence of record, explain the rationale employed in the case and clearly indicate the specific statutory or regulatory provision pertaining to a particular finding. Although the administrative law judge is empowered to weigh the evidence, he has provided little basis for his credibility determinations in this particular case. *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985);

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<sup>4</sup>Dr. Cross did not address the causation of the miner's disability. Director's Exhibit 23. Dr. Fenster opined that the miner's disability was due to cigarette smoking and coal dust exposure. Director's Exhibits 8, 23. Drs. Paul and Fino stated that the miner's disability was due to cigarette smoking. Director's Exhibit 22; Claimant's Exhibit 1.

<sup>5</sup>The administrative law judge noted that Dr. Fenster accounted for how both claimant's smoking history and his coal dust exposure contributed to his condition while Drs. Paul and Fino did not. While this may be a factor properly considered by the administrative law judge on remand, the administrative law judge must more thoroughly discuss the conflicting evidence at 20 C.F.R. §718.204(b).

*McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984). We therefore vacate the administrative law judge's findings under Section 718.204(b) and remand this case to the administrative law judge to specifically set forth the basis for finding certain reports of record reasoned and documented and to discuss the credibility of each opinion.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge